IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.713 OF 2006

1. Food Corporation of India, a Statutory Corporation, having its address formerly at Mistri Bhavan, Dinshaw Wachha Road, Churchgate, Mumbai-400 020 now at Dheeraj Arma, 2nd floor, Dr.A.K. Road, Bandra (East), Mumbai-400 051.
2. Mahesh Chandra Tewari, Ex-Senior Regional Manager (MAH), Food Corporation of India, having his address formerly at Mistri Bhavan, Dinshaw Wachha Road, Churchgate, Mumbai-400 020, now at Dheeraj Arma, 2nd floor, Dr.A.K.Road, Bandra (East), Mumbai--400 051. : Petitioners

V/s.

1. Clearing and Forwarding Unprotected Dock Labour Board for Greater Mumbai, Thane and Raigad Districts, having its Office at A-1, "Amba Bhawan", Devji Ratansi Marg, Mumbai-400 009.

2. Shri S.M. Deore, Inspector Clearing
& Forwarding Unprotected Dock
Labour Board for Greater Bombay,
Thane and Raigad Districts, having
his office at A-1, "Amba Bhavan",
Devji Ratansi Marg, Mumbai-400 009.

3. State of Maharashtra, Through the
Secretary, Industries & Labour
Department, Mantralaya,
Mumbai-400 032
Notice to be served on the
Government Pleader, High Court,
Original Side, Mumbai-400 032. : Respondents

...

Mr.P.M.Patel with Ms Rushi Shah i/b. M.S.Bodhanwalla & Co., for the petitioners.

Mr.M.S.Topkar for respondent Nos.1 & 2.

Mr.M.More, Asstt. Govt. Pleader for respondent No.3.

...

CORAM : F.I.REBELLO & ANOOP V. MOHTA,JJ.

DATE : MARCH 31, 2006.

ORAL JUDGEMENT (Per Rebello,J.)

1. Rule. Heard forthwith.

2. Petitioner no.1 is a statutory body incorporated under

the provisions of the Food Corporation Act, 1964. Petitioner no.2 is an ex-Senior Regional Manager of Petitioner no.1. Respondent no.1 is a statutory Board established under the provisions of the Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act, 1969 (hereinafter referred to as the "Mathadi Act"). Respondent no.3 in exercise of the powers conferred upon it, under the Mathadi Act has established a Board known as "Clearing and Forwarding Unprotected Dock Labour Board for Greater Mumbai, Thane and Raigad Districts" (hereinafter referred to as the said "Board"). It is the case of the petitioners that they are approaching this Court on account of acts of respondent nos.1 & 2 who seek to impose the provisions of the Mathadi Act on them, thereby infringing the fundamental right of freedom of trade guaranteed under Article 19(1)(g) of the Constitution of India. Petitioner no.1 is engaged in the business of foodgrains and has to act in accordance with the directions issued by the Government of India. Petitioner no.1 in that capacity has to act both as importers and exporters. For that purpose, it has also godowns and storage spaces all over India. It is their case that they are not engaged in clearing and forwarding of goods and for that purpose, whenever they have to import or export foodgrains, they engage agents who are doing the work of clearing and forwarding. These agents

in turn employ workers for the work of loading and unloading who are registered by the Board. The petitioners ensure as part of their contract with the clearing and forwarding agencies, that the workmen who are engaged in clearing and forwarding are registered with the Board. It is set out that the aims and objects of the Mathadi Act is to protect workers working in docks for loading and unloading operations of goods for different entities and have no full time employment or in a given instance not even work for a full day. As these workmen were not getting regular employment or not having a permanent place of work and were being exploited, the State Government thought it fit to bring the Mathadi Act into force.

3. From the correspondence exchanged between the petitioners and respondent no.1 since January 1997, respondent no.1 has brought to the attention of the petitioners, that the Mathadi Act and the scheme framed thereunder are applicable to the establishment of the petitioners. The petitioners were, therefore, directed to get registered or face penal consequences. It is the case of the petitioners that their understanding is that the Mathadi Act does not apply to them and, consequently, they did not register themselves as they were merely consignees. Respondent no.1 thereafter issued a show

cause notices to petitioner no.1 as to why penal action should not be taken. The petitioners replied to the same. Respondent no.1 once again called upon the petitioners, as they are the principal employers, under the Mathadi Act to register themselves as the principal employer. The petitioners failed to do so and, consequently, respondent no.2 has filed a complaint before the 10th Labour Court at Mumbai in Case no.(MHWA) 9 of 1998 for offences under clause 1 read with clause 43 of the Scheme read with section 3(3) of the Mathadi Act.

The petitioners moved an application on 25.6.2003 under section 258 of the C.P.C. to terminate the proceedings and discharge the petitioners. The ground taken was, that the applicability of the Mathadi Act has not yet been decided by the appropriate Government and further they were merely consignees and not principal employer and, therefore, no prosecution can be launched against them. By order dated 17.11.2005, the 10th Labour Court rejected the application of the petitioners dated 19.8.2005. By the present petition, what the petitioners seek is to challenge the show cause notice dated 30.12.1997, the threatening letter dated 18.3.1998 and the order dated 17.11.2005 passed by the 10th Labour Court on the application for discharge.

4. The principal contention urged on behalf of the petitioners is that they are not liable to be covered under the provisions of the Mathadi Act as they do not satisfy the definition of either ‘employer’ or ‘principal employer’. It is further submitted that as the dispute is as to whether the provisions of the Act are applicable to them, respondent nos.1 and 2 were duty bound to refer the matter to the State Government under section 5 of the Mathadi Act. It is, therefore, submitted that in these circumstances, the prosecution launched against the petitioners is without any authority of law and, consequently, the show cause notice as also the complaint and the impugned order are liable to be quashed and set aside.

On the other hand, on behalf of the respondents, their learned counsel submits that the petitioners have come belatedly to challenge the show cause notice which is of the year 1997. On this ground alone, it is submitted that the petition is liable to be dismissed on the ground of laches. Insofar as the order of the trial Court is concerned, it is submitted that the order does not suffer from any error apparent or jurisdictional error. It is always open to the petitioners to lead evidence before the trial Court. It is further submitted that the petitioners are the principal employers within the meaning of the

Mathadi Act and the Scheme framed thereunder, insofar as unprotected workmen are concerned and, consequently, they had to register themselves with the Board. Having not done so, it is submitted that the petition is liable to be dismissed.

5. The first question that we have to ask ourselves is whether there is any dispute as to whether any question arises, whether the scheme applies to any class of unprotected workers or employers in order to refer the matter to the State Government under section 5 of the Mathadi Act. Section 5 reads as under:-

> "5. If any question arises whether any scheme applies to any class of unprotected workers or employers, the matter shall be referred to the State Government and the decision of the State Government on the question, which shall be taken after consulting the Advisory Committee constituted under section 14, shall be final."

We may also consider some other definitions, which would be relevant for the purpose of deciding the controversy. Section 2(2) defines a "contractor" as

under:-

> "(2) "contractor", in relation to an unprotected worker, means a person who undertakes to execute any work for an establishment by engaging such workers on hire or otherwise, or who supplies such worker either in groups, gangs (tollis), or as individuals; and includes a sub-contractor, an agent, a mukadum or a tolliwala;"

Section 2(3) defines "employer" as under:-

> "(3) "employer", in relation to any unprotected workers engaged by or through contractor, means the principal employer and in relation to any other unprotected worker, the person who has ultimate control over the affairs of the establishment, and includes any other person to whom the affairs of such establishment are entrusted, whether such person is called an agent, manager or is called by any other name prevailing in the scheduled employment;"

Section 2(4) defines "establishment" as under:-

> "(4) "establishment" means any place or premises, including the precincts thereof, in which or in any part of which any scheduled employment is being or is ordinarily carried on;"

Section 2(7) defines "principal employer" as under:-

> "(7) "principal employer" means an employer who engages unprotected workers by or through a contractor in any scheduled employment;"

Section 2(9) defines "scheduled employment" as under:-

> "(9) "scheduled employment" means any employment specified in the Schedule hereto or any process or branch of work forming part of such employment;"

6. In the instant case, there is no dispute that the petitioners are importing or exporting foodgrains where the work of unloading and/or loading is to be carried

out. This work is covered by the Schedule. Workers engaged to do this work, therefore, would be unprotected workers for the purpose of the Mathadi Act and the Schedule to the Act. The contention of the petitioners is that the work of clearing and forwarding for which unprotected workers are engaged is done through a contractor, who engages workers registered with the Board. It is, therefore, submitted that though they are the principal employers, nonetheless they are not employers within the meaning of the Mathadi Act and, consequently, as a dispute arises as to whether they are governed by the Act, the matter should be referred under section 5 of the Mathadi Act. As we have noted earlier, there is really no dispute that the work being carried on by the workers is manual work included under the Schedule and the workers so employed, therefore, become unprotected workers. It is only in the event of a dispute about the applicability of the Act, that a reference needs be made. In the instant case, the petitioners themselves accept that they engage contractors who do the work by engaging workers registered with the Board. In other words, the work of clearing or forwarding done through the contractors is work covered by the Schedule. It is, therefore, not a case as to whether there is a dispute as to the applicability of the Scheme. The dispute at the highest

is whether the petitioners as the principal employers have to register with the respondent-Board. The dispute is not whether the scheme applies to the employer.

7. We have earlier reproduced the definition of "employer". The definition can be split up into two parts. The first is when an employer engages by or through a contractor an unprotected worker, then the employer would be the principal employer. In the second situation, in relation to any other unprotected worker, the person who has the ultimate control over the affairs of the establishment and includes any other person to whom the affairs of such establishment are entrusted, whether such person is called an agent or manager or is called by any other name prevailing in the scheduled employment. If the employer does not fall in the first part, then to show that they are not the employer, the employer will have to show that they do not have the ultimate control but some other person to whom the affairs of such establishment are entrusted has the control. "Establishment" as referred to earlier means a place or premises where any scheduled employment is being or is ordinarily carried on. There is no dispute that when workers are engaged to lift or remove the foodgrains, that place will be the establishment of the petitioners. It is only in the event that the place

where the work is carried out does not constitute an establishment, then the issue will arise as to whether any dispute is required to be referred to under section 5 of the Mathadi Act.

8. With the above, we may firstly refer to the judgments referred to by the learned counsel in support of his contention. A reference was made to the judgement in Shree Cloth Market Maratha Kamgar Sangharsha Samiti v. Baba Transport Company & Ors. (2002 II CLR 359). On the facts of that case, there was a dispute as to which scheme would be applicable and, consequently, it was held that it would be the Board. It is in that context that the learned Judge of this Court was pleased to observe that if any question arises whether any scheme applies to any class of unprotected workers or employers, the matter shall be referred to the State Government. No such issue arises in the present case.

In Poona Merchants Chamber through President, Shri Madanlal S. Nahar, Pune v. State of Maharashtra & Ors. (2003 II CLR 645), the matter was referred to the State Government about the applicability of the Act. The learned Bench of this Court held that the decision was regarding the applicability of the Act and no reasons were given and it is in these circumstances that the

order was set aside. This judgement, therefore, would be of no assistance.

Similarly, Precious Gas Service & Anr. v. Chairman, Goods Transport Labour Board for Greater Bombay & Anr. (2003 1 CLR 785), was a case of a reference made to the State Government. The order was set aside on the ground that the decision is not as per the requirement of section 5 of the Act. This judgement also would be of no assistance to the petitioners.

9. On behalf of respondent nos.1 & 2, their learned counsel placed before us the judgement of the apex Court in Maharashtra Rajya Mathadi Transport & Central Kamgar Union v. State of Maharashtra & Ors. (1995 II CLR 217). The issue before the apex Court was whether hundekaris who engaged Mathadi workers are required to be registered with the Vegetable Market Board. The apex Court held that the Board is required to register hundekaris only when they have ultimate control over the affairs of the establishment or has been entrusted with the carrying on the affairs of the establishment and not otherwise. However, when hundekaris engage a Mathadi worker for executing the work of an establishment over which he has no ultimate control or the affairs of which are not entrusted to him, he would be a contractor within the

meaning of section 2(2) of the Act and not an employer who engages an unprotected worker by or through a contractor in the scheduled employment. It will, therefore, be apparent that even a contractor if he has control over the establishment would be the principal employer but if as a contractor, he is doing the work of the principal employer, has no control over the establishment, then he is not the employer. In our opinion, this judgement lays down the test as to who should be registered with the Board in respect of any scheduled employment.

10. The petitioners must have established that the scheme does not apply to them, as they are not the employers or the contractor whom they engage has the ultimate control over the affairs of their establishment and/or the contractor is a person to whom the affairs of the establishment are entrusted. It is only then there is no requirement of they being registered with the Board. As we have noted earlier, the reference to the Government could not be when there is a dispute as to whether any scheme applies to any class of workers. The petitioners do not dispute that the work being done is a work included in the Schedule and covered by a scheme. Their only contention is that as they carry on work through a contractor who is registered with the Board and

who engages workers employed with the Board, they are not liable to be registered. The argument as advanced has nothing to do with the applicability of the Act. In these circumstances, we are of the opinion that the no case is made out for interference in the exercise of our extraordinary jurisdiction at this stage.

11. In the light of that, the rule stands discharged. There shall be no order as to costs.

Sd/-

F.I. REBELLO, J.

Sd/-

ANOOP V. MOHTA, J.